SUPREME COURT OF THE UNITED STATES

**October Term, 1943.**

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**No. 1005.**

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46TH STREET THEATRE CORPORATION AND SELECT OPERATING CO., INC.,
*Petitioners,*
vs.
ROBERT WM. CHRISTIE.

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# BRIEF OF THE ATTORNEY-GENERAL OF THE STATE OF NEW YORK, AS AMICUS CURIAE, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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## Preliminary Statement.

The Attorney-General appeared in this cause in all courts below in support of the constitutionality of the provision of the Civil Rights Law of the State now under attack (R. 11, 56, 69). Such appearance was made under authority of a statute of the State (Executive Law § 68) and pursuant to an order of the trial court granted thereunder (R. 1, 10). He will desire similarly to appear in this Court in the event that the writ is granted.

## ARGUMENT.

### I.

**The statute in question (New York Civil Rights Law, Section 40-b), is not invalid as depriving petitioner of the equal protection of the laws.**

In the courts below, petitioner attacked the statute as being violative of both the due process clause and the equal protection clause of the Fourteenth Amendment. In this Court, the contention that the statute was not a proper exercise of the police power and hence constituted a denial of due process has been abandoned. The very definite ruling of this Court in *Western Turf Ass'n.* v. *Greenberg* (1906), 204 U. S. 359, alone would seem to compel retreat from a position so untenable. We think that equally untenable is the petitioner's position in respect to equal protection.

There have been at least four adjudicated cases in this State besides the present one in which proprietors of legitimate theatres have arbitrarily excluded ticket holders from their performances. *Collister* v. *Hayman* (1905), 183 N. Y. 250; *People ex rel. Burnham* v. *Flynn* (1907), 189 N. Y 180; *Luxenberg* v. *Keith & Proctor Amusement Co.* (1909), 64 Misc. 69; *Woollcott* v. *Shubert* (1916), 217 N. Y. 212. Prior to the passage of the present statute, the efforts of these individuals to obtain redress from the courts proved unavailing because of the "absence of an express statute controlling his (the proprietor's) action". *People ex rel. Burnham* v. *Flynn, Supra.*, at page 185. How many other such instances there may have been we do not know. We know that the public press recently carried an account of the exclusion of a critic from a legitimate theatre even af-

ter the present statute had been held by the Trial Court and by the Appellate Division to be valid. In any event, it is sufficient, we think, that the Legislature found an evil to exist in respect to those places of amusement embraced within the terms of the statute and that that evil did not exist in respect to those not so embraced.

Nothing is more firmly established than that the equal protection clause of the Fourteenth Amendment does not take from the states the power to classify for the purpose of legislation under the police power. It has often been said that the Legislature has wide discretion in such matters and that its acts will be condemned only if purely arbitrary. *Whitney* v. *California* (1927), 274 U. S. 357, 369. The statement is frequently found in the opinions of this Court that distinctions made by the Legislature will not be held invalid if any state of facts reasonably can be conceived that would sustain them. *Metropolitan Co.* v. *Brownell* (1935), 294 U. S. 580, 584. It is also a well recognized principle that the Legislature is not bound to extend its police regulations to all cases which they may properly reach. It has been said that, in such case, the Legislature may "proceed cautiously, step by step", and that "if an evil is specially experienced in a particular branch of business" it is not necessary that the prohibition "should be couched in all-embracing terms." *Radice* v. *New York* (1924), 264 U. S. 292, 297.

Petitioner particularly stresses the fact that motion picture theatres are not embraced within the terms of the statute. Differences in the two types of theatre are readily apparent. Some of these differences have been pointed out in the opinion of the Presiding Justice of the Appellate Division (R. 60). But, of even greater significance upon the present question is the fact that the Legislature has found

an abuse to exist in respect to the legitimate theatre which does not exist in respect to the motion picture theatre. That, in and of itself, is, we submit, a sufficient and valid reason for making the distinction that has been made.

## Conclusion.

To avoid possible repetition of a more detailed argument which we assume will be made by counsel for the respondent, this brief has been restricted to a very brief discussion of the subject. We think, however, that the observations which we have made are sufficient, without more, to convince the Court that the present statute does not deprive petitioner of the equal protection of the laws and that the petition should be denied.

Dated: June 5, 1944.

Respectfully submitted,

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